United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

75-7696

76-7038, 76-7264

In The

United States Court of Appeals

For The Second Circuit

KURT SCHMIEDER,

Plaintiff-Appellant,

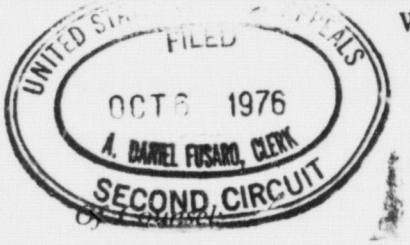
vs.

LOUIS H. HALL, as executor of the estate of HELEN B. DWYER, deceased,

Defendant-Appellee.

On Appeal from the United States District Court, Southern District of New York.

APPELLANT'S PETITION FOR REHEARING AND/OR REHEARING EN BANC



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PLAINTIFF-APPELLANT'S PETITION FOR REHEARING AND/OR REHEARING EN BANC

The two concepts placed in issue in this appeal, confiscation, and overreaching, are abhorrent to our democratic society. The panel passes on neither, although the facts found by the court below demonstrate the existence of both. To add to them the appearance of the inability of an individual to seek relief from such injustice is to demonstrate to the public a callousness and indifference which should not be shown unless the reasons are clearly set forth as meriting such treatment. For this reason appellant petitions that the Court should reconsider the decision in this case, and in view of the exceptional importance of the questions, and of this Court's departure from decisions of this Court of Appeals and other circuit courts of appeals, rehearing en banc is merited.

Should a man who resorted to a means to avoid the use of his American property by the Nazi regime, at great risk to himself, be deprived of access to our courts in seeking relief at the hands of equity, for the purpose of imposing a responsibility on those who would take advantage of him through the exercise of a confidential relationship and thereby received an absolute windfall to which they have no moral or equitable right whatever?

The position of the United States in this action adds to the appearance of sanctity placed by the panel on the violation of the confidential relationship between attorney and client so clearly demonstrated in the record. Having settled the claim of Mrs. Dwyer, the Department of Justice feels compelled to justify its settlement by advocating the position of the appellee that appellant has no rights, even though it places a contingent claim upon any recovery to which appellant would become entitled, by virtue of the vesting order. Thus it advocates giving up its own rights, and the sanctioning by the Court of the unethical and immoral actions of Dwyer and the executor of her estate, a member of the bar, in contravention of the statutes it is charged with enforcing. What stands out is that the claim should not have been settled after Judge Holtzoff of the United States District Court for the District of Columbia, in denying Dwyer's motion for summary judgment, had found upon the then uncontested proof that Dwyer was a straw, opening the aspect of professional overreaching (897a, fn. 27). The Government's position alone should call for a full review of the record and an independent exposition by the Court of the serious issues presented for review in this case.

The panel was critical to the point of condemnation for cluttering up the federal court system in "abuse of the judicial process" for appellant's having split his causes of action when an examination of the record will show that three district judges, in passing on pre-trial motions, characterized the action as calling for the invocation of the conscience of equity, covering the totality of events during both the pre-vesting and post-vesting

periods. However, the trial judge chose to consider the complaint as related to a cause of action for "fraud" which accrued in 1938. Appellant moved twice for relief from the judgment by reason of ambiguity as to what was decided and from other undue process. The trial judge ruled on December 9, 1975, that "any attempt to clarify would be futile." His second ruling on December 22, 1975 (993a) contained the language quoted as his "previous opinion" at the top of page 15 of the panel opinion, which could have cleared the scope of what the judgment covered if the said language had not been a mere addendum to a primary ruling by which the trial judge ruled himself to lack jurisdiction. This created a new uncertainty which appellant, without success, endeavored to get resolved by a motion before this Court for interlocutory testing of the appealability of the first judgment.

Appellant is a man of eighty-eight years, and it is, and has been, his wish to dispose of this matter prior to his death. But a pursuit of the second action was required to protect his rights.

The panel opinion makes no mention of the issue on which the court below decided this case, namely, the extent of the operation of an order issued pursuant to the Trading with the Enemy Act vesting property interests of nationals of enemy countries. More particularly, can the Executive cut off all rights of such a person to bring legal action, long after the cessation of hostilities and the operation of the Act, to invoke the power of equity in the enforcement of a personal obligation rather than a property interest when the vesting order does not by its language even purport to seize such rights? This is an issue which has never been ruled on by any court in a case involving the conscience of equity and the in personam power of the courts to compel the parties to act equitably, by way of the remedial expedient of constructive trust and without any substantive trust. In a far simpler situation, where like here, the in personam claim of the enemy alien had not been vested, this Court held that the unexercised remedy of constructive trust was not

susceptible of vesting [*Stoehr v. Miller*, 296 F.2d 414, 425-426 (C.C.A. 1923), see appellant's reply brief, pp. 7-10]. However, courts have distinguished between personal and property rights, and held contrary to the position of the court below with respect to personal rights. courts have restricted the operation of the war power to the absolute essentialities and the clearly stated authority granted, and the position of the court below is out of harmony with both the letter and the spirit of those holdings. Both appellant and the public are entitled to a ruling of the Court on this issue.

The Suggestion of the United States herein reached appellant's attorneys two days prior to the date of the argument on appeal. It raises the strange claim that a violation of federal common law "is precisely the result which a vesting order is intended to achieve" and characterizes appellant's reliance on a superiority of the common law over the Trading with the Enemy Act as "absurd." The Government's brief as amicus curiae in the *Kawato* case deals much less definitely with that point, and there clearly is great need for its review. Similarly superficial is the Suggestion's defense against an operation of 50 U.S.C. App. Sec. 41, concerning automatic divesting of contingent rights not vested in possession by December 31, 1961 (there is a printing mistake at the bottom of page 5 of the Suggestion: the date should be "December 17, 1941" in lieu of "December 31, 1961"). The Government rests its argument upon the vesting in possession of Dwyer's gift property. The asset in issue however is appellant's claim against Dwyer. The Suggestion filed in the court below made its impounding of appellant's potential recovery herein contingent upon his prevailing in his action for constructive trust. Also intrinsically, the remedy ripened subsequent to December 31, 1961 only upon the call of the conscience of equity. One or more of the foregoing points of appeal will eradicate the whole aspect of vesting from the instant case. Still, they have not been passed upon in review.

The court below, and the panel of this Court, view the crucial consideration as being the *form* of the transaction between Schmieder and Mrs. Dwyer, which they conclude as having been an absolute gift. However, they overlook the principle that constructive trust, is a concept applied not to enforce a transaction or promise; but to grant relief despite, and in the face of, the form and nature of the transaction. The trial court took great pains to point out the evidence showing that what was intended was an absolute gift, but neglected to consider that the gift was entered into within the confidential relationship between Hall and Schmieder, with Hall acting as treble agent for Schmieder as donor, himself as holder of the power to appoint the donee, and for Dwyer as appointee (with whom the attorney maintained a "personal and trusting relationship" (890a)) and that the gift was therefore tainted and controlled by the overriding law which holds that such a gift to Dwyer is subject to a strong presumption of irregularity, and imposes a convincing burden of proof of freedom from overreaching on the party attempting to sustain its validity. This was never discussed by either court, and demands consideration and exposition. It was not enough to find the existence of an absolute gift, as the court did; it was essential in order to support that gift to show the satisfaction of the burden of proof of regularity and freedom from taint, such as concerning the matter of availability of other alternatives as testified to by Schmieder. This was not done, and yet nowhere was this fact even mentioned by the courts. Nor was this aspect observed by the Attorney General at the time of the settlement with Dwyer. It is submitted that this point is so basic as alone to call for rehearing and reconsideration.

The panel opinion is in itself contradictory. On one hand, it speaks of appellant's largesse in favor of Mrs. Dwyer, and later of the necessity of his giving away his American property to guarantee his own safety from the Nazi regime. The important issue was not resolved by the panel: where a common law gift was not made, but rather an absolute transfer without

consideration and accompanied by an attorney-client relationship, is there an equitable obligation for payment of unjust enrichment when the circumstances giving rise to the professionally prescribed transfer have ceased to exist, and when the exclusion of any obligation on the part of the transferee does no longer need to be maintained for the protection of the transferor? In any event, the provision for absence of any obligation was an empty embellishment for the reason that many obligations cogently resulted from the guaranty of the transferor's safety. This is a matter of great importance, particularly dealing with the responsibility of members of the bar and of employees controlled by them to their clients, and one which this Court has a responsibility to consider before it becomes law on the basis of the unclear position taken by a single district judge in disagreement with three of his brethren on other occasions in the same case.

The facts of this case particularly warrant review due to the apparent conflict in representation by the attorney in acting for his secretary against the interest of appellant (Reply Brief, 14-15, 17-18), with the attorney's own children upon the secretary's death ending up with the property rather than her own relatives, who would be the natural objects of her bounty, or in any event with the attorney's selection of a donee who, from the moment of the receipt of the gift, had the tendency to leave the bulk of her estate to the attorney's children (E153).

What is to protect the confidential relationship and duty as between attorney and client, if the courts will not enforce equitable obligations which appear clearly from the relationship? This is a matter which should be clarified if the public is to understand the position of the Court, and not conclude that the Court has overlooked a serious breach of ethical and moral responsibility on the part of its officers and employees controlled by them. The spirit of Canons of Judicial Ethics would call for such an examination.

The only cause of action considered by the panel of the Court was the one relating to windfall abuse (in action No. 2) and even on this the Court did not rule on the law, but simply held the cause barred by res judicata. No windfall abuse could have occurred until after the vesting and after Mrs. Dwyer received the proceeds of the settlement with the Government, and she and Hall, Jr. refused to make any explanation to appellant. Therefore, the cause of action for windfall abuse arose years after the original transaction, had no roots in 1938, and constituted a new and different cause of action involving different operative facts in large part. The Court did not consider this, preferring to view the issue broadly rather than analyze the record. Further, in applying the *Kawato* decision of the Supreme Court, it failed to apply what was the basic holding: that if the Government is not to receive the benefits of an action giving rise to a windfall it should certainly not accrue to the benefit of the wrongdoer as a matter of public policy. The new element of the public interest under federal law against windfall overrides res judicata.

There cannot be any res judicata against the damage claims raised by action No. 2 because the remedy (constructive trust) sought in action No. 1 was different. Summary judgment should issue in appellant's favor because his complaint and affidavits were not controverted.

Appellee did not controvert appellant's affirmations nor the allegations of the complaint in action No. 2. There is at least some genuine issue of fact left open as to whether appellant was impeded "by reasonable doubt as to what was decided in the first action" and that any claims other than for fraud and deceit were not realistically litigated (1062a, 1063a). On this and other grounds appellee's motion for summary judgment should be denied.

Finally, the observations of the panel opinion with respect to the appellant's "lavish desire" constituting "abuse of judicial process" is not supported by the opinion of the court below or

the record, and before the Court permits such language to be applied to a valiant and courageous man who suffered severe discrimination at the hand of both the Nazis and the East German Communists due to his democratic beliefs, and who, in order to avoid the use of his property by the Nazi war machine risked his life and simply seeks restitution of what in equity and justice is his, it should do more than place the stamp of approval on the decision of the lower court where most of the arguments proffered by appellant have not been passed upon. Our appellate processes are intended for the purpose of providing litigants, both citizens and aliens, with means of correcting errors in trial courts, and the labelling of the appellant in the manner done by the panel, without considering and passing on the issues presented on appeal, does not comport with good appellate practice.

Dated, New York, New York
September 29, 1976

Respectfully submitted,

s/ Werner Galleski
Attorney for Plaintiff-Appellant

James P. Duffy III
Robert H. Reiter
Richard L. Medverd
Werner Galleski
Of Counsel

AFFIDAVIT OF SERVICE

Re: 75-7696 76-7038,76-7264
Schmieder v. Hall

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer , being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Appellant.

That on the 4th day of October , 1976, I served the within Petition for Rehearing in the matter of Kurt Schmieder v. Louis H. Hall, etal , upon Robert B. Fiske, Jr., Esq., 1 St. Andrews Plaza, New York, New York 10007; Turchin & Topper, Esqs., 60 East 42nd Street, New York, New York 10017 and Martin Obermayer & Morvillo, Esqs., 1290 Sixth Avenue, New York, New York 10019

by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 4th day
of October 1976.

Lorraine Leotta
A Notary Public of the
State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977